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No. 79-253

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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Washington, D.C. 20530

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1. Appellee contends that "[a] person charged with a violation of the child labor laws may take exception *only* to the determination [by the assistant regional administrator] that the violation actually occurred" (Br. 46; emphasis in original). According to appellee, the administrative law judge may review de novo only the occurrence of the violation and not the amount of the penalty imposed (Br. 46-49). This contention is incorrect.

The applicable regulations provide that the administrative law judge is to review de novo *both* the fact of the violation and the propriety of the penalty imposed. Under these regulations, when an exception is filed to the notice of violation issued by the assistant regional administrator, "the final determination of the penalty

shall be made in an administrative proceeding" conducted before the administrative law judge. 29 C.F.R. 579.4(c). In that proceeding, the administrative law judge (29 C.F.R. 580.32(a)):

> may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or * * * may find that no violations occurred, and shall order payment of a penalty in the amount originally assessed or in a lesser amount * * * or order that respondent pay no penalty, as appropriate.

In determining de novo whether a penalty less than that originally assessed is appropriate, the administrative law judge is directed to consider the *very factors* initially considered by the assistant regional administrator. *Ibid.*, citing 29 C.F.R. 579.5.[1]

The administrative law judge is thus fully empowered to make a complete de novo review both of the existence of the violation and the appropriate penalty to be imposed.[2] Indeed, in the administrative proceedings that occasioned

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[1]These factors include, "among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours." 29 C.F.R. 579.5(c).

[2]Appellee incorrectly intimates (Br. 47-48) that the Secretary has argued in this case and others that the administrative law judge lacks authority to make a de novo review of penalty assessments. The Secretary has never espoused such a position. The sentence quoted by appellee (*ibid.*) from the Secretary's brief in the administrative proceedings in this case is quite plainly quoted out of context. When the relevant passage is read in its entirety, it is apparent that it

this litigation, even though the fact "[t]hat the violations occurred is undisputed" (A. 11), the administrative law judge reviewed the circumstances surrounding the

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contends only that the administrative law judge may not rule on constitutional attacks upon the penalty provisions of the Act; it supports the administrative law judge's authority to review de novo the reasonableness of the penalty assessment. The full passage reads:

> Clearly, there is no statutory grant of authority to an Administrative Law Judge under Section 16(e) of the Act nor under the applicable portions of the Administrative Procedure Act to consider or *to rule on constitutional issues.* The exception permitted by Section 16(e) is expressly limited to whether the violations for which the penalty is imposed actually occurred. This defines the scope of the matter to be heard by the ALJ and he cannot consider matters outside that scope.
>
> Furthermore, the Departmental regulations * * * also consider the ALJ's authority as limited to the occurrence of the violation *and the penalty imposed.*

Brief for the Secretary at 32 (emphasis added).

In *Marshall* v. *Sambo's Restaurants, Inc.*, Lab. L. Rep. (CCH) para. 31,311 (1979), on which appellee relies (Br. 48 n.17), the administrative law judge agreed that the applicable regulations authorized him to redetermine the amount of the assessed penalty de novo if an exception were filed to the occurrence of the violations. However, at the urging of the Department of Labor attorney assigned to that case, the administrative law judge then reached the admittedly "anomalous" result that he lacked any jurisdiction to act when the exception was limited to the amount of the penalty and did not attack the determination that a violation had occurred. The Secretary has never agreed with the latter aspect of the decision in *Sambo's Restaurants*. The Secretary's unvarying official position has been that his regulations authorize de novo review to determine the appropriate amount of the penalty to be imposed regardless of whether review of the determination of the violation is also sought. See, *e.g.*, *Marshall* v. *Teitel Enterprises, Inc.*, [Wages-Hours, Administrative Rulings, 1973-1978 Transfer Binder] Lab. L. Rep. (CCH) para. 31,186 (1978); *Marshall* v. *Swanson Brothers, Inc.*, [Wages-Hours, Administrative Rulings, 1973-1978 Transfer Binder] Lab. L. Rep. (CCH) para. 31,147 (1977). An isolated misstatement of that position by one of his attorneys, such as occurred in *Sambo's Restaurants*, cannot override

violations and reduced the penalty assessed against appellee from $103,000 to $18,500 (A. 12). This form of de novo administrative review to determine an appropriate penalty not only comports with the applicable regulations, but also is consistent with Congress' intent in enacting the penalty provisions of Section 16(e). The House Report states (H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 51 (1974) (emphasis added)) that:

> The Secretary is to determine the amount of the penalty and his determination is final unless exception is taken to the determination within 15 days thereof. If exception is so taken *the amount shall be determined in an adjudicatory proceeding* under [the Administrative Procedure Act].

2.*a*. Appellee contends that if this Court strikes down the reimbursement provision of Section 16(e), it must invalidate the statute in its entirety because the remaining portion would not be "fully operative as a law" (Br. 52, quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)). Appellee acknowledges, however, that, as the district court noted, it would be "simple and constitutionally sound [to] pay all civil money penalty funds directly into the Treasury of the United States" (Br. 53, citing J.S. App. 12a). Appellee

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the Secretary's regulations or otherwise thereby become the official position of the Secretary. See *Miller* v. *Youakim*, 440 U.S. 125, 144-145 n.25 (1979); *Hodgson* v. *Square D Co.*, 459 F. 2d 805, 809-811 (6th Cir.), cert. denied, 409 U.S. 967 (1972). Unlike the construction urged by appellee, the Secretary's interpretation of his regulations is plainly reasonable, is consistent with the legislative history, and does not create doubts as to its constitutionality. It should therefore not be disregarded. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358-361 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

argues only that, if the creimbursement provision were removed from Section 16(e), nothing in the statute would provide for the payment of penalties to the Treasury.

But, in the absence of express language in a statute directing payment elsewhere, civil or criminal statutory penalties are always to be paid to the Treasury. Thus, numerous statutes provide only that a fine or penalty may be assessed without further directing that payment is to be made to the Treasury. See, *e.g.*, 18 U.S.C. 32, 41, 42, 205; 21 U.S.C. 333, 676; 46 U.S.C. 1228. In the instant case, there is ample basis for presuming that Congress would have preferred that penalty funds be paid directly into the Treasury rather than eliminate the civil penalty system altogether. The legislative history of Section 16(e) demonstrates that the overriding congressional concern behind enactment of Section 16(e) was to improve enforcement of the child labor prohibitions through imposition of a civil monetary sanction. The reimbursement provision was merely incidental to achievement of that basic congressional goal (see our principal brief at pages 34-35). Particularly in view of the Act's broad severability clause, payment of penalty funds into the Treasury would surely more nearly comport with Congress' intention than would "eliminat[ing] its policy altogether" (*Welsh* v. *United States*, 398 U.S. 333, 355-356 (1970) (Harlan, J., concurring)) by leaving enforcement of the nation's child labor laws to remedies already found to be generally ineffective.[3]

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[3]Moreover, appellee's objection reveals a misapprehension of the government's fiscal processes. Funds received by executive departments are ordinarily held in accounts in the Treasury. The reimbursement provision does not provide otherwise; its effect is merely to authorize a credit at the Treasury on behalf of the account maintained for the Employment standards Administration (ESA). Should this Court sever the penalty provision from the reimbursement provision and hold only the latter to be unconstitutional, the

b. Appellee argues that, if the Court severs the penalty provision of Section 16(e) from the reimbursement provision and holds only the latter to be unconstitutional, "the injunction issued by the district court should remain in full force and effect" (Br. 56). But the district court did not limit its relief to declaring unconstitutional, and enjoining enforcement of, the reimbursement provision. Instead, it permanently enjoined appellants "from enforcing section 16(e) * * * against [appellee] and * * * from requiring the payment of civil money penalties assessed against [it]" (J.S. App. 1a-2a; see also *id.* at 13a). It is apparent that, if the penalty provision is upheld and only the reimbursement provision is declared unconstitutional, the Secretary should not be enjoined from enforcing the penalty provision against appellee at least with regard to future violations of the Act. The injunction entered by the district court therefore should be reversed at least to that extent.

Moreover, even if the initial calculation of penalties by the assistant regional administrator in the administrative proceedings that gave rise to this litigation is deemed to have been improperly biased by the reimbursement provision of the statute, the district court should not have enjoined collection of the civil penalties that have been assessed against appellee for past violations of the Act. Even if the reimbursement provision of the statute is invalid and the penalty cannot be allocated to the regional administrator, imposition of the penalty in the de novo

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penalty funds would be paid directly into the general fund of the Treasury and ESA would simply be prohibited from using the penalty funds to meet its expenses pursuant to Section 16(e). Undistributed penalty proceeds automatically lapse to the general funds of the Treasury pursuant to 31 U.S.C. 701(a)(2).

proceeding before a neutral administrative law judge did not violate due process.[4] The penalty therefore properly should be paid into the Treasury.[5]

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[4]In view of the administrative law judge's findings that the occurrence of child labor violations in appellee's restaurants is "undisputed" and that appellee's "responsibility cannot be disputed" (A. 11), appellee cannot plausibly maintain that the Secretary's decision to cite it for violations of 29 U.S.C. 212 is attributable to the challenged provision of Section 16(e).

[5]Contrary to appellee's contention (Br. 26 & n.12) that Congress has been "kept in the dark" about the Secretary's civil penalty collection efforts, the Department of Labor submits to Congress substantial information concerning this category of "offsetting collections" in its annual budget requests and official reports. See, *e.g.*, *Budget of the United States Government, Fiscal Year 1980—Appendix* 651-652; United States Department of Labor, Employment Standards Administration, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: An Economic Effects Study Submitted to Congress* 28-30 (1978); *United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978* 62, 92, 138.